Causation: Prevailing Factor: A year later

Glenn M. Amundson, M.D.

On May 15, 2011, the Kansas Workers Compensation Reform Act took effect, putting in place the first significant reform in Kansas worker's compensation laws since 1993. Governor Sam Brownback approved the law changes. The changes apply to injuries that occurred on or after May 15, 2011. The most important change is to the standard for compensability of injuries. An injury is no longer compensable if work is only a triggering or precipitating factor or if work simply aggravates, accelerates or exacerbates a preexisting condition, or makes it symptomatic. Similar to the changes made to the Missouri worker's compensation law in 2005, the Kansas Legislature deemed that for an injury to be compensable, the work accident must be the "prevailing" factor (primary factor) in causing the (1) injury, (2) medical condition, and (3) resulting disability or impairment.

The physician's medical opinion must include a determination on the "Prevailing Factor". The physician must rule out other plausible causes and focus on the most probable cause. Physician's decision making considerations include: (1) Reported mechanism of injury / accident (Time, Place, and Actions). (2) Objective findings on exam. (3) Past medical history including, if available a functional screening at the time of hire. (4) Assessment of personal or pre-existing factors. (5) Physical demands of the job (PDA). (6) Duration of work activities. (7) Frequency of any repetitious work activities. And, (8) Any diagnostic or workplace studies.

Physical Demands / Employment Screening has Value as it relates to "Prevailing Factor". **(1) Real physical demands are established, so it is known when there is a work place hazard – fix when possible. (2) Baseline capabilities for the job are defined. Does the worker have the functional ability to perform the job demands? What limitations might an employee have? Can they be accommodated? (3) A health history is documented. A worker can be identified as having pre-existing conditions before there is an injury, rather than after the injury occurs. (4) A better job – worker match is possible to prevent future injury.**

The new definition of Accident (K.S.A. 44-508 (d)). **An "accident" is defined as an undesigned, sudden, and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily accompanied by a manifestation of force. An accident is identifiable by time and place of occurrence, and must produce at the time of accident, symptoms of injury and must occur during a single work shift. An "accident" shall in no case be construed to include repetitive trauma in any form. To be compensable, the work accident must be the "prevailing factor" cause of (1) the injury; (2) the need for treatment; and (3) the resulting impairment or disability. If the accident causation**

proof fails in any of these three elements, the accident is deemed to "not arise out of employment". The "simple aggravation of a pre-existing condition" rule is gone. An injury is compensable only if it arises out of and in the course of employment, and is not compensable because work is a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates, or exacerbates a pre-existing condition or renders a pre-existing condition symptomatic. An injury which occurs as a result of natural aging or normal activities of day-to-day living, arises out of a neutral risk with no particular employment or personal character, or injury which occurs either directly or indirectly from idiopathic causes is not compensable. The "prevailing factor" is defined as the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the Administrative Law Judge considers all relevant evidence submitted by the parties. All compensation is disallowed in the case where the injury results from the employee's "reckless" disregard of an employer safety rule or regulation. For the accidental injury to "arise out of" employment, the claimant must prove a causal connection between the "conditions" under which the work is required to be "performed" and the work accident. Non-mandatory social/recreational events do not arise out of and are not deemed in the course of employment. Due to the aforementioned conditions of law, It is now even more essential that all relevant medical history information concerning the claimant be discovered, procured and available. Medical experts cannot be expected to render accurate dispositions on the "Prevailing Factor" without obtaining complete and accurate medical histories, derived from all available pertinent medical records.

Definition of "Repetitive Trauma" (K.S.A. 44-508(e)). **"Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or micro-traumas. The repetitive nature of the injury must be demonstrated by diagnostic and clinical tests. The repetitive trauma must be the "prevailing factor" in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease. An injury by repetitive trauma arises out of employment only if the employment exposed the worker to an increased risk or hazard, which the worker would not have been exposed to in normal non-employment life. The repetitive trauma must be the "prevailing factor" in causing both the medical condition and resulting disability or impairment.**

Establishing the Date of Accident for Repetitive Trauma (K.S.A. **44-508(e)). In cases of injury by repetitive trauma, the date of injury shall be the earliest of (1) the date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma; (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma; (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work related; or (4) the last day worked if the employee no longer works for the employer against whom benefits are sought. In no case shall the date of accident be later than the last day worked.**

Drug and Alcohol Penalties (K.S.A. 44-501(b)(1)). **The new law creates a situation in which injured employees may lose all of their benefits if he or she took too much of a non-prescription drug. The statute has created a presumption of impairment (denial of benefits) for a positive drug test, according to the thresholds for each particular drug. An employee's refusal to submit to a chemical**

test at the request of the employer results in forfeiture of benefits, if the employer has sufficient cause to suspect the use of alcohol or drugs by the claimant or if the employer's policy clearly authorizes post-injury testing.

Recreational Activities (K.S.A. 44-508 (F)(2)(c)). **Accidents or injuries occurring while an employee is engaged in recreational or social events are not compensable when the employee was under no duty to attend, or the injury did not result from the performance of tasks related to the employee's normal job duties, unless specifically instructed to be performed by the employer.**

Horseplay and Fighting (K.S.A. 44-501). **This new section allows for forfeiture of benefits if the injury results from horseplay or fighting no matter the cause or who may have been the aggressor.**

Notice of Accident (K.S.A. 44-520). **Notice must be given by the earliest of the following days: (1) Thirty (30) calendar days from the date of accident or injury by repetitive trauma; (2) Twenty (20) calendar days from the date the employee seeks medical treatment for the injury; or, (3) Twenty (20) calendar days from the employee's last day of actual work for the employer.**

Medical Treatment (K.S.A. 44-510(h)). **The employer has the right to select the treating physician. The employee has $500 unauthorized medical allowance for treatment. The employer's obligation to provide medical treatment terminates upon the employee reaching maximum medical improvement.**

Future Medical Treatment (K.S.A. 44-525(a)). **No award shall include the right to future medical treatment unless it's proved by the claimant that it is more probable than not that future medical treatment will be required as a result of the work related injury.**

Terminating Post-Award Medical Benefits (K.S.A. 44-510 (k)). **If a claimant has not received medical treatment within two years from the date of the award or two years from the date the claimant last received medical treatment, the employer is permitted to make an application for permanent termination of future medical benefits. In such cases, there shall be a presumption that no further medical care is needed.**

Causation. **Causation is the legal gateway for taking care of Worker's Compensation injuries. It is also one of the most frustrating components of care of worker's compensation patients; second only to outcomes. Unless all aspects of the injury are truly obvious, no one knows! Important, is a history of: previous back surgery, scoliosis, spondylolisthesis, stenosis, Klippel-Feil syndrome and other congenital problems, and significant pre-existing arthritis or degenerative change. Pre-existing condition, or predisposed to on-the-job injury? The only way to know is to do pre-employment full work-ups and not hire if significant medical conditions exist. Is this cost effective or discriminatory? Physicians must take the whole package of patient history, past medical, physical exam and diagnostic studies and make a decision that is fair to all sides of the question of causation. Causation evaluation choices involve: (1) Finding physicians that deny everything, (2) Finding physicians that approve all injuries, or (3) Finding physicians that provide well-documented and fair assessments of injury. Balanced decision-making physicians are going to be wrong sometimes, because NO ONE KNOWS! Spine injuries are rarely obvious. Issues arise regarding whether it is an on-the –job injury, or on the**

job worker who has an injury? The earlier a disposition is made, the more streamlined and efficient care can be administered. Many workers are injured, performing simple activities at work, no different than experienced off the job…opening a file cabinet, picking up a piece of paper, sweeping, or turning to answer a phone, have been treated as a work-related injuries. Causation was never addressed. Without a doubt age, genetics, level of conditioning, obesity, smoking, chronic use of narcotic analgesics, recreational activities, past surgeries, and MVA's and falls can contribute to the employee's injury. Just because it happened at work, doesn't mean work is responsible. Physicians must consider and balance all parts of the causation equation. Some of the most difficult injuries to determine causation are due to legal involvement. Often a patient's legal involvement results in evaluations and care being delayed, or having been carried out by multiple physicians. Regardless, the work place can be dangerous resulting in serious injury due to lifting, bending, falls, and twisting-impact accidents.

Final Determination. **Physicians must give a medical opinion based upon the presenting evaluation including medical records made available. This is not an exact science. As the facts evolve, so does the opinion. Having all pertinent past medical records is extraordinarily important. The initial visit may reveal positive findings that later are determined to be pre-existing upon medical records review. The more accurate and comprehensive the patient information provided, the more accurate the disposition.**

Changes to Kansas Workers' Compensation Act – 2011

Issue	Law Before Changes	Law After Changes
Causation	Aggravates, accelerates, or intensifies condition.	Prevailing factor in the injury. Prevailing factor means primary factor. 44-508(g).
Arising Out Of and in the Course of Employment	Not compensable if recreational or social events not obligated to attend. 44-508(f).	Not compensable: (1) work a triggering or precipitating factor, (2) work aggravates or accelerates a pre-existing condition, (3) work renders a pre-existing condition symptomatic, (4) natural aging process, (5) neutral risk, (6) idiopathic injuries, (7) risk personal to the worker, (8) recreational or social events not required to attend. 44-508(f).
Coming and Going	Injuries sustained on way to or after leaving work not compensable. Worker on the premises of employer or only route involving a special risk or hazard was compensable. 44-508(f).	Premises must be owned or controlled by employer to be compensable. Special risk or hazard of route must be connected to nature of the employment as well. 44-508(f).
Notice	10 days or 75 days for just cause. 44-520.	Earliest of: (1) 30 days, (2) 20 days from the employee seeks medical treatment if still employed, or (3) 20 days from last day of work.
Repetitive Trauma	Considered same as accident. 44-508(d).	(1) Result of repetitive use, cumulative trauma, or microtrauma. (2) Must be demonstrated by diagnostic or clinical tests (3) Repetitive trauma must be the prevailing factor in injury (4) Repetitive trauma is never an occupational disease. 44-508(e).
Date of Accident for Repetitive Trauma	Date authorized physician takes claimant off work or provides restrictions. If not done, then earliest of the following: (1) Date of written notice to the employer. (2) Date condition diagnosed as work related. 44-508(d).	Earliest of: (1) date taken off work by doctor, (2) date placed on light duty by doctor, (3) date advised by doctor condition is work related, or (4) last date worked if no longer employed. 44-508(e).
Arising out of for Repetitive Trauma	No provisions separate from accident.	Must be: (1) Increased risk or hazard compared to non-employment life. (2) Increased risk or hazard is the prevailing factor in the trauma. (3) Repetitive trauma is the prevailing factor in both the medical condition and the resulting disability or impairment. 44-508(e).
Alcohol and Drug Testing	Employer must show that impairment contributed to accident. 44-501(d)(2).	Positive drug or alcohol test is rebuttable presumption the impairment contributed to the accident. 44-501(b)(1)(D).
Safety Rules	No benefits if injury results from deliberate intent, willful failure to use guard or protection provided. 44-501(d)(1).	No compensation for reckless violation of safety rules or fighting or horseplay. Compensation allowed when under the totality of the circumstances it was reasonable not to use a guard or protection or if the employer approved the work without the equipment. 44-508(f).